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No. 94-1039

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF AMICI CURIAE STATES OF OREGON, IOWA, MARYLAND, MASSACHUSETTS, MINNESOTA, NEVADA, WASHINGTON, AND THE DISTRICT OF COLUMBIA SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Equal Protection Clause is violated by a state constitutional provision that prohibits state government from enacting or enforcing any law or policy that would protect gays, lesbians, and bisexuals from any form of public or private discrimination based on their sexual orientation.

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INTEREST OF AMICI

The States of Oregon, Iowa, Maryland, Massachusetts, Minnesota, Nevada, Washington and the District of Columbia submit this brief in support of respondents, pursuant to Supreme Court Rule 37.5. The issue in this case arises out of an amendment to the State of Colorado's constitution. That amendment explicitly disables the State from prohibiting any form of discrimination against a person because of his or her sexual orientation. In defense of this withdrawal of state protection, petitioners argue that a majority of voters may always disable a State from protecting any disfavored group from discrimina-

tion so long as the group is not a suspect class. To hold otherwise, petitioners contend, would be an unjustified interference with state sovereignty. The *amici* States' interest in this case arises, in large part, from the arguments petitioners make.

All the *amici* States and the District of Columbia have adopted antidiscrimination laws. None of their antidiscrimination laws is limited to suspect classes. Rather, most jurisdictions, as well as the federal government, have extended protection against discrimination to non-suspect groups, such as the aged, the mentally retarded, and the physically disabled. Some States and the District of Columbia have also protected their citizens from public (and sometimes private) discrimination on the basis of sexual orientation.[1] If, as petitioners argue, a majority may always disable government from protecting a disfavored group from discrimination so long as it does not target a suspect class, then the *amici* States' efforts to protect their aged, mentally retarded, and handicapped citizens (as well as their gay, lesbian, and bisexual citizens) from popular bias will be jeopardized.

Petitioners' arguments implicate a second state interest. In their defense of Colorado's amendment, petitioners and their supporters express deep concerns about the potential effect an adverse decision would have on the States' sovereign right to allocate authority among the various divisions of state government. The States joining in this brief value their sovereignty equally with Colorado and the States that have appeared in Colorado's support. We, too, would be troubled by a federal equal protection analysis that would require courts to scrutinize

[1]Some States have enacted statutes prohibiting discrimination on the basis of sexual orientation. *See, e.g.*, Mass. Gen. L. ch. 151B, § 4 (employment); D.C. Code Ann. §1-2512(a) (1981) (employment); D.C. Code Ann. § 1-2515(a) (1981) (real estate sales); N.J. Rev. Stat. § 10:5-4 (1994) (employment). Other States have adopted similar policies by executive order and by administrative rule. In Oregon, for example, more than 20 agencies ranging from the Construction Contractors Board to the Department of Veterans' Affairs include sexual orientation in their antidiscrimination policies.

the wisdom of every public policy contained in a State's constitution. And we would be concerned by any significant threat to the vitality of the tools of participatory democracy, such as the initiative and referendum.[2] But we do not believe this case presents that kind of threat. With due respect for Colorado and our sister States, in our view their concerns about the potential effect of an adverse decision are misplaced. The *amici* States have an interest in clarifying the record by putting another state perspective before the Court.

SUMMARY OF ARGUMENT

1. The threshold issue to be addressed in this case is whether the substantive policy contained in Amendment 2 is itself legitimate, and therefore one that a State is entitled to pursue. Under any level of scrutiny, even rational basis, state laws must always be aimed at legitimate objectives. Amendment 2 is not.

Amendment 2 in effect provides that no law may be enacted or enforced to protect gays, lesbians, and bisexuals from discrimination of any kind. By placing this prohibition in its constitutional charter, Colorado has categorically prohibited its government from protecting a group of its citizens from any form of discrimination. The discrimination may be public or private. It may be in housing, employment, and public accommodation; in the provision of governmental benefits and services; or in any other area or form open to the imagination of private citizens and public officials alike. No segment of life's activities is spared from the amendment's indiscriminate reach. Amendment 2 stands as nothing more refined than a

[2]Several of the *amici* States have long traditions of direct participation of the electorate through initiative, referendum, and recall. Oregon, for example, is generally credited with having been the State where initiative, referendum, and recall procedures were first seriously discussed and exercised. As a result, such provisions were known collectively for decades as "the Oregon system." *See generally* Schuman, *The Origin of State Constitutional Direct Democracy*, 67 TEMPLE L. REV. 947, 947–48 (1994).

blanket endorsement of discrimination for the sake of discrimination, one that elevates public and private discrimination against one group of citizens to the status of a constitutional right. Whatever lines might be drawn to differentiate among citizens on the basis of sexual orientation, the wholesale authorization of discrimination found in Amendment 2 is not a legitimate state goal, for this or for any other group. Amendment 2 fails the threshold test that any law must meet under the Equal Protection Clause, and for that reason alone is unconstitutional.

2. Petitioners defend Amendment 2 as merely withdrawing a policy choice from elected officials and placing it in the voters' hands. The amendment, however, is not that benign. In effect, Colorado has withdrawn equal access to governmental protection from discrimination based only on one group's common personal characteristics. For all other groups, suspect and non-suspect, when they need legislation or policies directed to the interests they share by virtue of their distinguishing personal characteristics (age, marital status, mental or physical disability), Colorado's government has the power to protect them. But when the shared personal characteristic is gay, lesbian, or bisexual orientation, Colorado's government is no longer the government to which they may turn.

The invidious effect of that restructuring of political decisionmaking should not be underestimated. The Equal Protection Clause is indifferent to a State's allocation of lawmaking power, so long as the terms of its political structure are neutral. But to withdraw governmental power by reference to the personal characteristics of a distinctive group, and to declare that no law may be enacted or enforced protecting that group from discrimination, is to declare in advance that persons, not issues, are to be the consistent losers in any contest over their group interests. The result is all the more pernicious given Amendment 2's broad focus on laws that would protect gays, lesbians, and bisexuals from discrimination of any kind.

Amendment 2 is the antithesis of the neutrality that the Equal Protection Clause requires. It can be sustained, if at all, only if it satisfies strict scrutiny or some other heightened level of review, which it does not.

3. Finally, even if Amendment 2 is subject only to a rational basis test, it is invalid. That test requires that the Court first ask what line is drawn by Amendment 2's terms, and then whether that line rationally serves legitimate state objectives. Properly, petitioners must advance rational reasons for Amendment 2's categorical authorization of discrimination against gays, lesbians, and bisexuals. None of petitioners' rationales is adequate to support the amendment's breadth. Moreover, all of their proffered rationales at most defend private discrimination, not the public discrimination that Amendment 2 also authorizes. The problem is not simply one of imprecision. Rather, the problem is that petitioners' rationales are far too narrow, and the sweep of Amendment 2 too broad, to provide the necessary confidence that Amendment 2 is supported by anything other than private bias and prejudice.

ARGUMENT

I. INTRODUCTION

Prior to the enactment of Colorado's "anti-gay rights" initiative to amend the State's Constitution (Amendment 2), the state legislature, the governor, some state agencies, and certain local governmental bodies had adopted various laws and policies designed to protect Colorado's citizens from discrimination on the basis of sexual orientation. Most of those policies and laws related to private and public discrimination in the areas of employment, housing, public accommodation, and higher education. The protections given to persons on the basis of sexual orientation were extensions of antidiscrimination policies previously adopted and in place for numerous other non-suspect classes of citizens, such as the aged, the mentally and physically disabled, and unmarried persons. The judgment

of many of Colorado's elected officials and representatives had been that gays, lesbians, and bisexuals were also singled out for private and public discriminatory treatment on the basis of personal characteristics having no real relationship to ability or need, and were equally in need of protection.

Amendment 2 was a "grassroots" response to those governmental policies and enactments. Using Colorado's initiative process, a coalition of private citizens ("Colorado for Family Values") succeeded in gathering the necessary signatures to qualify Amendment 2 for the 1992 general election ballot. By a small majority, the voters passed the provision. Colorado's Constitution effectively was amended to declare that no legislative body or public official may enact or enforce any law or policy that provides a basis for any claim of discrimination against gays, lesbians, and bisexuals.

Central to petitioners' defense of Amendment 2 is their view that this amendment amounts to nothing more than a routine exercise of the people's authority to express their disagreement and displeasure with the policies of their governmental officials, and to change those policies. As petitioners cast it, this is simply a case in which gays, lesbians, and bisexuals "lost an election"; their interests have not been harmed in any way that is of consequence to the Equal Protection Clause. (Pet. Br. 27). Gays, lesbians, and bisexuals, petitioners maintain, "continue to have precisely the same rights as *anyone else* who has lost an election. They may continue to participate fully in all of Colorado's political processes; what they do not have is a right to *successful* participation in those processes." (*Ibid.*) (emphasis in original).

Were this a case involving a mere repeal of a public policy with which a majority of private citizens disagree, the *amici* States would have no quarrel either with petitioners' arguments or with their defense of the actions of Colorado voters. The political process is designed for exactly those disagreements.

When legislatures enact unpopular laws, citizens may put political pressure on their governor to veto them. If the governor fails to do so, voters in some States may force a referral of the law for popular vote; in other States, voters may initiate repealing legislation. In all States, voters retain access to the power of the ballot box—that is, they may "vote the rascals out"—either using special recall procedures or declining to vote for incumbents when they stand for reelection. Through these and other mechanisms, political decisionmaking involves a dynamic process of checks and balances, with the will of popular majorities operating as a frequent check.

This is not, however, a case in which Colorado voters have merely checked the actions of their elected government officials. Here they have achieved a checkmate. Amendment 2 does more than repeal the previously adopted antidiscrimination policies and laws for sexual orientation. It operates to divest all branches of Colorado's government of any authority to act in the future, leaving gays, lesbians, and bisexuals with no protection other than whatever a popular majority can be implored to grant. And by doing so at a constitutional level, Amendment 2 expresses a substantive state policy that such discrimination is now officially authorized in Colorado.

From the *amici* States' perspective, this case is one that can and should be decided on a narrow ground. The Court need not decide whether gays, lesbians, and bisexuals are a suspect or quasi-suspect class, or whether sexual orientation can be a legitimate basis for some legislative distinctions. It is sufficient to hold that the wholesale withdrawal of a State's ability to protect one group of its citizens from discrimination, which Amendment 2 accomplishes, is not a legitimate state goal. That illegitimacy, even under a rational basis analysis, renders Amendment 2 unconstitutional.[3] This brief begins with that

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[3] Respondents raised the illegitimacy of Amendment 2 below in the course of analyzing it under a rational basis test. (*See* Def. Ans. Br. 17–18).

(continued...)

argument. It then explains why the Colorado Supreme Court's analysis, properly understood, provides an alternative ground for holding Amendment 2 unconstitutional.

II. AMENDMENT 2 IS INVALID BECAUSE IT LACKS A LEGITIMATE STATE OBJECTIVE.

A. Amendment 2 Is Not Entitled to Any Special Deference.

One of the core attributes of state sovereignty is a State's authority to structure its form of government in the way that it chooses. *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849) (a State may alter and change its form of government at the people's pleasure). It is therefore generally true that a State may distribute legislative power as it desires, and that the people of a State, through initiative and referendum, may retain for themselves power over certain subjects. *See, e.g., Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 70 (1978); *Hunter v. Erickson*, 393 U.S. 385, 392 (1969); *id.*, at 394 (Harlan, J. concurring). Considerations of sovereignty, however, provide no justification for a choice of political structure that otherwise violates the Fourteenth Amendment. *Hunter*, 393 U.S., at 392. Nor does the fact that particular changes are adopted through popular initiative or referendum provide any basis to give greater leeway to a State's chosen political form. *Lucas v. Colorado General Assembly*, 377 U.S. 713, 726–37 (1964); *see also U.S. Term Limits, Inc. v. Thornton*, ___ U.S. ___, 63 USLW 4412, 4422 n. 19 (1995). Contrary to petitioners'

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[3](...continued)
Moreover, the issue is subsumed in petitioners' own rational basis argument, which asserts that Amendment 2 rationally serves legitimate state objectives. (Pet. Br. 13, 39–48). Thus, even though the Colorado Supreme Court decided the case on an alternative ground, the question of Amendment 2's legitimacy is properly before the Court. *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

position,[4] the fact that Amendment 2 may implicate the structure of Colorado's government, or that it was passed by initiative and reflects popular majoritarian will, provides Colorado no special shelter from the requirements of the Equal Protection Clause. *See Gordon v. Lance*, 403 U.S. 1, 6 (1971) ("the Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy"); *Sailors v. Board of Education*, 387 U.S. 105, 109 (1967) (vast leeway is due a State in the management of its internal affairs only save and unless it runs afoul of a federally protected right).

B. Amendment 2 Disables Colorado's Government from Addressing Discrimination Against One Group of Citizens.

The starting point for any equal protection analysis should be the terms of the amendment, together with its immediate objective, ultimate effect, and historical context. *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967); *see Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 462–64 (1982) (examining validity of law in light of its effect and the campaign that led to its enactment); *Hunter*, 393 U.S., at 391 (same). The full text of Amendment 2 is set out in petitioners' brief. (Pet. Br. 2). Pared to its operative provisions, the amendment provides that neither state nor local government may enact or enforce any law or policy "whereby homosexual, lesbian or bisexual orientation . . . shall constitute or otherwise be the basis of . . . any claim of . . . protected status or claim of discrimination."[5]

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[4] Pet. Br. 14–16.

[5] Consistent with the posture of the case in the lower courts, we focus only on sexual orientation, not "conduct, practices, or relationships." The Colorado Supreme Court limited its holding to orientation, and did not reach the other prohibitions set out in Amendment 2. The Court invalidated the amendment as a whole because, as a matter of state law, the other prohibitions were not severable. *Evans v. Romer*, 882 P.2d 1335, 1349–50 (Colo. 1994). Similarly, we do not concern ourselves in this brief with the amendment's references to quota preferences, which may present a different

(continued...)

By virtue of its text alone, the object of Amendment 2 is clear. It is aimed at one group of citizens defined solely by a distinctive personal characteristic—sexual orientation. Its effect is equally clear. It explicitly disables state and local government from protecting gays, lesbians, and bisexuals from any act of discrimination they suffer because of their sexual orientation. Amendment 2 does not mince words. It expressly makes "discrimination" part of the Colorado Constitution. And it does so not by simply repealing an existing antidiscrimination provision, but by preventing government from taking any steps in the future to protect its citizens from any discrimination (public or private) based on their sexual orientation.

The history of Amendment 2's enactment confirms that it was intended to have precisely that effect. Prior to the passage of Amendment 2, several state and local governmental bodies in Colorado had recognized a need to protect gays, lesbians, and bisexuals from discriminatory actions directed against them because of their sexual orientation. State agencies in Colorado similarly had adopted policies to protect gays, lesbians, and bisexuals from discrimination in state employment and higher education. (*See* Pet. Cert. App. F). In voting on the amendment, the citizens of Colorado were apprised of the legislative and executive response nationwide to discrimination based on sexual orientation. Specifically, they were told that at least six States and the District of Columbia, 110 cities and counties in 25 States, eight governors, and 65 college and university systems had extended antidiscrimination legislation and policies to cover sexual orientation. (*Id.*, App. F-5, F-6).

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[5](...continued)
question and were not the focus of the campaign to enact the measure. *See* Pet. Cert. App. F (legislative council analysis of the measure); App. B (district court opinion). Nor do we concern ourselves with the concept of governmental grants of "minority status" which, despite its popularity in provisions of this kind, is legally incomprehensible. *See Mabon v. Keisling*, 317 Or. 406, 414, 856 P.2d 1023 (1993) (the concept of "granting minority status" to homosexuals or any other group has no recognized meaning).

The Colorado voters simultaneously were assured, however, that if Amendment 2 were enacted, current protective policies in Colorado would be nullified, and state and local governmental officials and entities in Colorado would have no power to adopt or enforce similar policies in the future. (*Id.*, App. F-1). As against what had been a growing responsiveness at state and local government levels to a perceived need to protect gays, lesbians, and bisexuals from discrimination in at least certain areas of private and public life, Amendment 2 offered Colorado's voters a promise that in their State, the same responsiveness would be preemptively foreclosed.

What emerges both from Amendment 2's text and the background against which it was enacted is a design to close off the ordinary channels of government to a disfavored group of citizens, so that they could not seek protection from discrimination in any area that government had in the past or would in the future consider.

C. The Substantive Policy Choice Contained in Amendment 2 Is Illegitimate.

The Court has long recognized that even under a rational basis test, government must seek to advance a legitimate state interest. *E.g.*, *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (asking whether the "classification drawn by the statute is rationally related to a legitimate state interest"). Said another way, even if a law rationally or perfectly furthers an objective, it is invalid if the objective is one that government simply is not entitled to advance.

The terms of Amendment 2 demonstrate that it fails that threshold inquiry. The amendment effectively declares, in so many words, that no law shall be passed protecting gays, lesbians, and bisexuals from discrimination of any kind. Its goal is not to alter Colorado's political structure, but rather to announce substantive state policy. Expressly using the word "discrimination," it proclaims as a matter of state constitutional

law that both private citizens and public officials are free to discriminate on the basis of sexual orientation, and no governmental body or official may change that. Its very text communicates an unmistakable message to Colorado's citizens: After Amendment 2, gays, lesbians, and bisexuals constitutionally may be treated on unequal terms for any reason, or no reason, or for a bad reason.

Petitioners defend Amendment 2 as a mere "restructuring" of the political decisionmaking process in Colorado, by which the issue of discrimination based on sexual orientation has been withdrawn from public officials and committed instead to the will of the popular majority. (*E.g.*, Pet. Br. 11, 27). One could say the same, however, of Colorado's constitutional provisions protecting free speech or guarding against ex post facto and other laws. Article II, section 10 of Colorado's Constitution provides: "No law shall be passed impairing the freedom of speech . . . ." Article II, section 11 states: "No ex post facto law . . . shall be passed by the general assembly." Those, too, could be described as mere choices about which decisions are committed to the ordinary channels of government, and which are reserved to the people themselves. But that description would be sorely incomplete.

The familiar terms on which constitutional free speech, equal privileges, and similar provisions are commonly crafted are not, in any direct sense, choices of how to structure political decisionmaking; they are substantive guarantees, first and foremost. Put simply, constitutional prohibitions on lawmaking (and law enforcement) power are themselves a source of constitutional rights. When a state constitution, like the federal, declares that "no law shall be passed impairing the freedom of speech," that declaration stands as an affirmative acknowledgement of the cherished place expression has among our constitutional freedoms—so cherished that government cannot infringe it.

Amendment 2 is no different, either in its terms or effect. As an amendment to Colorado's Constitution, it elevates discrimination based on sexual orientation to the status of a positive constitutional right, on a par with free expression and the other liberties secured by Colorado's Bill of Rights. Just as a prohibition on laws directed at expression confers a correlative personal right to speak freely, so too does Amendment 2 confer a correlative personal right to discriminate freely. As was true in *Reitman*:

> The right to discriminate . . . [is] now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing . . . discrimination need no longer rely solely on their personal choice. They [may] now invoke express constitutional authority, free from censure or interference of any kind from official sources.

387 U.S., at 377 (describing the effect of elevating a policy of non-interference with private racial discrimination to a constitutional level).

The use of the word "discrimination," in and of itself, raises serious doubts about the legitimacy of Amendment 2's goals. When used without qualification or limitation, the substantive policy endorsed by Amendment 2 is unlike anything to come before the Court. Until now, similar cases have all involved challenges to political burdens or barriers erected in narrowly defined areas of particular voter concern—*e.g.*, sales and rentals of private housing, school busing, construction of low-income housing, group homes for the mentally retarded, and so on.[6] Amendment 2, in contrast, is a blanket endorsement

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[6] In *Reitman*, the challenged constitutional amendment was directed narrowly at private discrimination in housing. Somewhat more narrowly, in *Hunter*, the city charter amendment at issue required a referendum on ordinances specifically concerning racial, religious, or ancestral discrimina-

(continued...)

of discrimination. By its terms, it is not limited to discrimination in private housing or publicly available goods and services. Nor is it limited to discrimination in the provision of governmental food stamps or assistance progr s, or even discrimination against public employees in jobs, salaries, or other conditions of their government employment. To be sure, all of those are encompassed within Amendment 2's sweep. But so is public and private discrimination of virtually every other imaginable kind.[7] Where prior cases have involved legislation aimed at particular policy choices with a certain degree of strategic precision, Amendment 2 indiscriminately lays waste to an entire landscape. It authorizes public and private discrimination against gays, lesbians, and bisexuals in every segment of their lives. Nothing like Amendment 2 has been enacted into constitutional law by any governmental or populist body anywhere in this country, at least not since reconstruction and the passage of the Fourteenth Amendment established as an attribute of citizenship that no State may deny "any person" the equal protection of its laws.

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[6](...continued)
tion in housing. Likewise, *Seattle School District* concerned only a restriction on local school board authority to use busing to promote integration. *See also Cleburne*, *supra* (special zoning permit required for operation of group homes for the mentally retarded); *Zobel v. Williams*, 457 U.S. 55 (1982) (distribution of government funds to residents based on length of residency); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) (unrelated household members denied participation in food stamp program); *Gordon v. Lance*, *supra* (referenda required to incur bonded indebtedness or increase taxes); *James v. Valtierra*, 402 U.S. 137 (1971) (local referenda necessary to approve low income housing).

[7]Amendment 2 without question nullifies any antidiscrimination statutes and policies, present and future, adopted in Colorado by state and local government. Moreover, as the more specific provision and the one enacted later in time, Amendment 2 would presumably override any generalized equal protection guarantee contained in Colorado's constitution. *See de'Sha v. Reed*, 194 Colo. 367, 370, 572 P.2d 821, 823 (1977) (specific constitutional provisions govern over general ones and later enacted provisions impliedly repeal earlier enactments to the extent of a conflict). Petitioners have never contended otherwise.

Amendment 2, given its sweeping terms, stands as a novel endorsement of wholesale discrimination against a single group. It manifests a judgment that gay, lesbian, or bisexual status is a distinction that makes a difference for any purpose, and for all. In Colorado, gays, lesbians, and bisexual citizens are less equal simply because they have been categorically deemed less worthy of equality. Amendment 2 reflects no policy choice more subtle or refined than a policy of discrimination for discrimination's sake. It reduces to a provision that can be defended on no ground other than "a bare majoritarian desire to harm a politically unpopular group." *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *Cleburne*, 473 U.S., at 447. As the Court consistently has recognized, however, governmental endorsement of discrimination against any group, suspect or non-suspect, on the basis of mere negative attitudes and fears is never legitimate. *Ibid.* Discrimination for the sake of discrimination is just as illegitimate when directed at the mentally retarded (*Cleburne*), or even at hippies (*Moreno*), as it is when directed at persons based on race. It is equally illegitimate here, regardless of how this class of citizens is described in terms of its "suspectness," or what level of scrutiny applies.[8]

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[8]It is because of Amendment 2's breadth that the Court need not decide whether sexual orientation can be a legitimate basis for some legislative distinctions. The answer likely will be, as it is even for suspect and quasi-suspect groups, sometimes yes, and sometimes no.

> That a characteristic may be relevant under some or even many circumstances does not suggest any reason to presume it relevant under other circumstances where there is reason to suspect it is not. A sign that says "men only" looks very different on a bathroom door than a courthouse door.

Cleburne, 473 U.S., at 468–69 (Marshall, J. dissenting). The Court properly should leave for another day the question under what specific circumstances sexual orientation may provide a "sensible ground for different treatment" or instead bears "no relation to the individual's ability to participate in and contribute to society." *Id.*, at 440–41 (majority opinion). No specific policy choice is before the Court.

Ultimately, the question that should be asked in this case is not simply whether a State may enact a blanket policy of the kind contained in Amendment 2 insofar as it is directed to gays, lesbians, and bisexuals. The issue should be whether a State may, consistent with the Fourteenth Amendment, authorize such discrimination against any class of its citizens. If petitioners are correct, a State could amend its constitution to declare: "No law shall be passed protecting unmarried persons, the deaf, or the mentally retarded from discrimination." A similar provision could be directed to any number of other non-suspect classifications, such as age, infirmity, intelligence quotient, pregnancy, length of residency, genetic makeup, and so on.

We would be surprised if any jurisdiction would be willing to defend a wholesale policy of discrimination directed to any other non-suspect group defined exclusively by common personal characteristics. The difference, if there is one, can only be that on some unspoken level, petitioners and their *amici* are willing to accept the legitimacy of a popular majority's discomfort, prejudice, or fear where the terms are "gay, lesbian, or bisexual," but would not do so were the terms "single but pregnant" or "mentally retarded." From the vantage point of the Equal Protection Clause, however, there is no difference. A policy choice that reduces to a bare dislike for, disapproval of, or willingness to harm any group is constitutionally indefensible, even for a non-suspect class. *Moreno*, 413 U.S., at 534; *Cleburne*, 473 U.S., at 447. The Court need go no farther than these settled precedents to resolve this case.

III. AMENDMENT 2 UNCONSTITUTIONALLY DENIES A CLASS OF CITIZENS EQUAL ACCESS TO GOVERNMENTAL PROTECTION FROM DISCRIMINATION.

In the *amici* States' view, Amendment 2's primary effect is substantive, and it should be analyzed from that perspective. That is, the threshold question should be whether the policy

expressed in the amendment is a legitimate one. Petitioners, however, approach the problem differently. They defend Amendment 2 as a legitimate restructuring of state government. Viewed from that perspective, the question should be whether a State may structure its government so that all of its branches are powerless to provide any form of protection from discrimination to a class of citizens defined solely by a personal characteristic. None of the Court's cases has considered this precise question, although the principles underlying them demonstrate that the clear answer is "no."

The fact that Amendment 2 classifies citizens on the basis of personal characteristics brings this case within the Court's precedents, even if the characteristics are not deemed suspect ones. The further fact that Amendment 2 deprives gays, lesbians, and bisexuals of equal access to protection from all forms of discrimination sets the provision apart as a far more encompassing restriction on political participation interests than anything the Court has previously considered. Those aspects of Amendment 2, combined, implicate equal protection values in a particularly fundamental way. Moreover, they distinguish Amendment 2 from the numerous other public policies contained in States' constitutions that petitioners fear will be threatened if Amendment 2 is held invalid.

A. Amendment 2 Violates Equal Protection Principles of Neutrality.

The Court has observed that its equal protection cases "yield a simple but central principle": Laws that structure political institutions or allocate political power according to "neutral principles"—such as executive veto provisions, or supermajority requirements for constitutional amendments—are not subject to equal protection attack, even when those neutral terms pose greater barriers for minorities to achieve their policy goals. *Seattle School Dist.*, 458 U.S., at 469–70 (following Justice Harlan's concurrence in *Hunter*); *see also City of Mobile*

v. Bolden, 446 U.S. 55 (1980) (city's method of electing representatives "at large" was constitutional even though the participation of racial minorities was diluted). The Court has reasoned that because a neutral political structure imposes an equal burden on every group in the community to secure the benefits of governmental action, it provides a "just framework within which the diverse political groups in our society may fairly compete." *Seattle School Dist.*, 458 U.S., at 470.[9]

Neither petitioners nor their *amici* make any attempt to defend Amendment 2 as a neutral restructuring of political decisionmaking, nor could they. Amendment 2 is explicitly class-based. It carves out a separate decisionmaking process (majoritarian will) for one group of people based solely on their personal characteristics, whereas all other groups may use the ordinary channels of government. Moreover, Amendment 2 focuses directly on "discrimination." It alters the political process to require this one group of citizens to change their constitution as a predicate to seeking any legislation that would protect them from the "special condition" of prejudice. *See Seattle School Dist.*, 458 U.S., at 486.

No one should underestimate Amendment 2's practical and legal significance. No branch of Colorado's government can do anything to remedy any form of public or private discrimination

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[9] The principle of impartial governance, of course, is not limited to questions involving governmental form; it extends equally to the laws and regulations that governments adopt. And impartial governance is a value to be served even where non-suspect classes are concerned. For example, in a case involving employment policies for methadone users, the Court stated:

> The [Equal Protection] Clause announces a fundamental principle: the State must govern impartially. General rules that apply even-handedly to all persons within the jurisdiction unquestionably comply with this principle. Only when a governmental unit adopts a rule that has special impact on less than all the persons subject to its jurisdiction does the question whether this principle is violated arise.

New York City Transit Authority v. Beazer, 440 U.S. 568, 588 (1979).

against gays, lesbians, and bisexuals in any area of those citizens' lives. Thus, even though States have a "compelling" interest in public accommodation laws addressed to non-suspect as well as suspect groups,[10] Colorado's government cannot serve that compelling interest where gays, lesbians, and bisexuals are concerned. Nor can Colorado's government either prevent or remedy discrimination by the government itself, as in the distribution of state benefits and services, or the hiring, firing, and conditions of employment for public employees. And Colorado's government cannot respond where its otherwise neutral laws are administered on an unequal basis for gays, lesbians, and bisexuals.[11] As troubling, in Colorado, the government cannot fully serve the most basic of governmental goals, such as maintaining public order. For example, Colorado cannot impose correspondingly greater penalties for violent crimes motivated by bias (so-called "hate crimes") where the bias is directed at gay, lesbian, or bisexual status. That is true even though the States uniformly have found that bias crimes result in particularly great individual and societal harm because they "provoke retaliation crimes, inflict distinct emotional

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[10] *See Roberts v. U. S. Jaycees*, 468 U.S. 609, 626 (1984). The Court observed in *Roberts* that public accommodation laws reflect "the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups." *Ibid.*

[11] Historically, one of the most insidious ways in which public officials sometimes discriminate against disfavored individuals or groups is to decline to administer otherwise neutral laws in a fair and evenhanded way. Among the most potent antidotes for such discrimination is to address the problem directly, with legislation that specially defines the obligation to administer the law equally for the benefit of some disfavored group, and that gives rise to liability if that obligation is not met. Laws falling into this category have been directed at suspect and non-suspect groups alike. *See, e.g.*, 42 U.S.C. § 1973 (Voting Rights Act of 1973) and 20 U.S.C. §§ 602 *et seq.* (Education for the Handicapped Act), both of which have counterparts in some States. Colorado's government cannot take such steps. It cannot respond effectively if, for example, one or more local Colorado police departments routinely refused to investigate or charge assault crimes when the victims of those assaults are gay, lesbian, or bisexual citizens.

harms on their victims, and incite community unrest." *See Wisconsin v. Mitchell*, 113 S.Ct. 2194, 2201 (1993).

These consequences strike in a fundamental way at equal protection values. No State should be able to divest its government of all authority to address problems of discrimination for a single class of its citizens. Assuming such a disenfranchisement is not in and of itself illegitimate, it should at least be subject to heightened scrutiny. It is one thing simply to repeal existing antidiscrimination legislation. *Crawford v. Los Angeles Board of Education*, 458 U.S. 527, 538-39 (1982).[12] It is an altogether different matter to conclude that the legislative, executive, and judicial branches of government may be deprived of all power to respond to any form of discrimination, public or private, for a particular citizen group. Such a choice runs headlong into the Equal Protection Clause's core protection against subjecting "'one caste of persons to a code not applicable to another.'" *Jones v. Helms*, 452 U.S. 412, 424 (1981) (quoting Cong. Globe, 39th Cong., 1st. Sess., 2766 (1866)).[13]

[12] In *Crawford*, California amended the "equal protection" clause of its state constitution to provide that state courts could not require busing to remedy school segregation except to the extent the Fourteenth Amendment required it. 458 U.S., at 532. In holding the amendment constitutional, the Court was careful to note that the amendment did not prevent the state legislature from enacting (or state courts from enforcing) broader anti-discrimination laws than the Fourteenth Amendment required. *Id.*, at 536 n. 12. It merely repealed the state constitution's "equal protection" clause to the extent it imposed a greater obligation than the federal constitution. *Id.*, at 538-39 (distinguishing *Hunter* and *Reitman*). Unlike Amendment 2, the amendment at issue in *Crawford* did not disable state government from addressing the problem of discrimination.

[13] As the Court observed in *Jones*, an effective expression of this point was made in the Senate debate that preceded the adoption of the Fourteenth Amendment:

> This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. . . . It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it

(continued...)

All citizens have a fundamental interest in being governed by a government empowered to protect them from class-based discrimination. That protection is the essence of what the Clause guarantees when it declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

The net effect of any such class-based divestment of government's ordinary lawmaking and law enforcement power is to render the targeted class suspect, whether or not it was suspect before. Amendment 2 forecloses gays, lesbians, and bisexuals from seeking redress for discrimination through the ordinary channels of government. It negates the basis on which the Court ordinarily defers to the political judgments of the States, for it "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938); *see also Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400, 417 n. 25 (1983) (where legislative processes function properly, courts should defer to legislature's findings). In Colorado, gays, lesbians, and bisexuals have been placed in the same position of general political powerlessness that has caused courts to intervene more actively to protect the rights of other similarly situated groups. *See Carolene Products*, 304 U.S., at 153; *accord Seattle School Dist.*, 458 U.S., at 486. The point is not that gays, lesbians, and bisexuals as a class are suspect or quasi-suspect for constitutional purposes. Rather, the point is that in Colorado, their state constitution relegates them to that status. The very disabilities that traditionally have given rise to heightened scrutiny have been constitutionally codified by Amendment 2. Heightened scrutiny is called for precisely

[13] (...continued)

> gives to the most powerful, the most wealthy, or the most haughty. That, sir, is republican government, as I understand it, and the only one which can claim the praise of a just Government.

Id., at 424 n. 23 (quoting Senator Howard, Cong. Globe, 39th Cong., 1st. Sess., 2766 (1866)).

because of the political powerlessness that Amendment 2 itself achieves.[14]

B. Petitioners' Concerns About the Reach of a Decision Invalidating Amendment 2 Are Misplaced.

Petitioners are critical of the heightened review applied by the Colorado Supreme Court because they read its decision as announcing an unqualified right of "political participation" that runs to any number of groups that share a common goal. Petitioners fault the court initially for reading *Hunter* and its progeny too broadly. In their view, those cases should be limited to burdens placed on racial minorities (and perhaps other suspect classes). (Pet. Br. 19–24). Petitioners' argument fails to recognize that until this case, the Court has only had occasion to consider two types of "political structure" cases. At one end of the spectrum have been cases, such as *Hunter* and *Seattle School District*, that involved explicit racial classifications. At the other end have been cases such as *James v. Valtierra*, 402 U.S. 137 (1971), *Gordon*, and *City of Mobile*, all of which involved purely neutral terms for political decision-making and were not directed to explicit class distinctions of any kind, suspect or otherwise.[15] Until now, the Court has not

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[14]Suspect or quasi-suspect status historically has arisen out of the *de facto* unwillingness of government to respond to the needs of a minority group that is frequently the object of irrational distinctions based more on stereotypes and fear than on a realistic assessment of ability to participate in and contribute to society. *See generally* John Hart Ely, DEMOCRACY AND DISTRUST 153 (1980). In Colorado, for gays, lesbians, and bisexuals, the government's unresponsiveness to their interests is now *de jure*. Amendment 2 thus squarely implicates the judiciary's special role in safeguarding the interests of those groups "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

[15]In *Valtierra*, the majority and the dissent parted company on this point. The majority viewed the special referendum provisions for low-income (continued...)

considered any case precisely like this one. Although this case differs from *Hunter* in that it does not involve a racial classification, it is like *Hunter* (and different from *Valtierra* and *Gordon*) in that Amendment 2 does not operate on class-neutral terms. And Amendment 2 is more troubling than the law at issue in *Hunter* because it denies an entire class all protection from discrimination. Petitioners' easy distinction between this case and *Hunter* fails to recognize their more profound similarities.

Petitioners argue alternatively (and perhaps primarily) that extending *Hunter* beyond racial classifications will embroil federal courts in a ceaseless task of reviewing virtually every policy choice contained in a State's constitution. They view the state court's decision as an open-ended invitation to any disappointed constituency to invalidate state constitutional policy—constituencies that could range, they claim, from boy scout troops to tax protesters to victim's rights advocates; and include anti-abortionists and pro-abortionists, smokers and non-smokers alike, and persons on both sides of all similarly polarized issues. (Pet. Br. 35–38).

Petitioners' hypotheticals neither do credit to the Colorado Supreme Court's analysis, nor show allegiance to the principle of neutrality that has informed this Court's prior decisions. The Colorado Supreme Court did not resolve this case based on a vague and boundless right of "political participation." Rather, the court's holding was narrow. The right of political participation that the court recognized was a limited right to seek redress for discrimination directed to a group defined

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[15](...continued)
housing to be directed broadly at anyone advocating in favor of low income housing, *id.*, at 142, which of course could include those who might profit from that housing, as well as those who might live in it. The dissent would have analyzed the challenged provisions as directed specifically to poor persons as a class. *Id.*, at 145.

solely by a shared personal characteristic— sexual orientation.[16] That right is the essence of what the words of the Equal Protection Clause themselves guarantee. It is no answer, therefore, to argue that the voters in Colorado have merely exercised their authority to withdraw the issue of discrimination against gays, lesbians, and bisexuals from Colorado's government, and to entrust that issue to the will of the voters themselves. To be sure, in a democracy, all power ultimately flows from the consent of the governed. (*See* Pet. Br. 33–34). But the point of the Equal Protection Clause is that no person should have to seek that consent as a prerequisite to equal protection of the laws.

Nor did the Colorado Supreme Court use the term "independently identifiable group" to refer to any group that can be identified on the basis of common interests or shared political views, as petitioners assume. Rather, that term is best understood in the context in which it was used—that is, to refer to a group expressly singled out in the text of the amendment and defined solely by a personal trait, such as marital status, age, intelligence, or disability. *See Evans v. Romer*, 854 P.2d 1270, 1284–86 (Colo. 1993). So understood, the term is both much narrower than petitioners contend and consistent with the

[16] The state court repeatedly focused on the amendment's interference with political participation on issues of discrimination:

> [T]he right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians, and bisexuals from having an effective voice in government affairs *insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination based on their sexual orientation*. Amendment 2 alters the political process so that a targeted class is prohibited from obtaining legislative, executive, and judicial *protection or redress from discrimination absent the consent of a majority of the electorate through the adoption of a constitutional amendment*. Rather than attempting to withdraw anti-discrimination issues as a whole from state and local control, *Amendment 2 singles out one form of discrimination* and removes its redress from consideration by the normal political processes.

Evans v. Romer, 854 P.2d 1270, 1285 (Colo. 1993) (emphasis added).

Court's precedents. The neutrality with which the Court has been concerned is a neutrality as to persons identified as such, not neutrality as to issues of general concern and broad impact, around which diverse and shifting coalitions of American people generally (and sometimes predictably) align. *See Valtierra*, 402 U.S., at 142. The latter is merely the daily stuff of politics. The former—an explicit classification based solely on personal traits—rarely if ever provides a satisfactory basis for allocating a State's lawmaking and law enforcement authority.[17] As the Court has observed, the Equal Protection Clause is particularly sensitive to classifications based on "some unpopular trait or affiliation" because of the special likelihood that such lines may "create or reflect [a] special likelihood of bias on the part of the ruling majority." *New York Transit Authority v. Beazer*, 440 U.S. 568, 593 (1979).

Contrary to petitioners' claims, what is unprecedented in this case is not the result that the Colorado Supreme Court reached. It is the nature of the exercise of majoritarian power reflected in Amendment 2. In a single bold stroke, the amendment divests Colorado's government of any ability to protect one class (gays, lesbians, and bisexuals) from discrimination on the basis of their class characteristics. In doing so, it is unlike the myriad examples of constitutional policies that petitioners worry would be jeopardized if the Court invalidates Amendment 2. Few of petitioners' examples explicitly target classes at all, much less classes defined by a shared personal characteristic.

[17] The notion that courts should be suspicious of efforts to realign political decisionmaking along lines that focus on personal characteristics is intuitively correct. It is also consistent with the Court's voting rights cases, in which the Court has been concerned with denials or dilutions of political participation rights based not only on personal characteristics but also on extrinsic factors that ordinarily raise no equal protection concerns. *See, e.g., Cipriano v. City of Houma*, 395 U.S. 701 (1969) (revenue bond decisions to be made by "property taxpayers"); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (wealth); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) (tax status); *Carrington v. Rash*, 380 U.S. 89 (1965) (military status).

The only group characteristic reflected in most of the examples is a common viewpoint on a political or social issue of general concern and broad impact (*e.g.*, abortion, law enforcement). As or more important, none of them posits a circumstance where the group, however defined, has been constitutionally declared unworthy of governmental protection from discrimination in any aspect of public or private life.[18]

In short, Amendment 2 is as offensive to Equal Protection Clause values as the provisions that were before this Court in *Hunter* and *Seattle School District*. Even if Amendment 2 is viewed as a structural provision only, it should be subject to heightened review because it allocates political power to deny a singular group of Colorado's citizens equal access to

[18] To illustrate the distinction, consider petitioners' suggestion that a constitutional amendment prohibiting local governments from enacting antismoking laws might be invalid on the theory that the amendment disenfranchises non-smokers from political participation, because they can no longer seek to change laws at local levels. Such an example is not apt. A more analogous case would arise if a state constitution were amended to declare that "no law shall be passed protecting citizens on the basis of their status as smokers from any form of discrimination." Contrary to the assumption that underlies petitioners' hypotheticals, laws directed narrowly to activities in which people engage (*e.g.*, smoking in a particular locale) do not present the same issue as laws directed broadly to personal characteristics or status. *Compare Robinson v. California*, 370 U.S. 660 (1962) (punishing a person's status as an addict violates Eighth Amendment), *with Powell v. Texas*, 392 U.S. 514 (1968) (act of public intoxication may be punished constitutionally).

For the same reason, statutes that merely ensure neutrality are not problematic. The amicus brief filed by Alabama in petitioners' support, for example, argues that an Oregon statute would be invalid under the Colorado Supreme Court decision. (Ala. Am. Br. 22). That statute, however, merely ensures neutrality by preempting local laws that would grant "special privileges" based on sexual orientation, while simultaneously barring local laws that would specially disadvantage that group. Or. Rev. Stat. § 659.165. Ordinances that prohibit discrimination may still be enacted. The statute is therefore the antithesis of Amendment 2. It does not endorse discrimination; it does not disadvantage any group based on personal characteristics; and it does not deprive any such group of the ability to seek governmental protection from discrimination.

governmental protection from all discrimination. To satisfy that review, petitioners would have to come forward with a particularly weighty governmental interest and they would have to demonstrate a close fit between their chosen means and desired ends. *See Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982) (stating test for intermediate scrutiny). Petitioners properly do not argue that Amendment 2 can satisfy heightened review of any kind.

IV. NO RATIONAL JUSTIFICATION FOR AMENDMENT 2 CAN BE OR HAS BEEN ADVANCED.

Petitioners recognize that they must at least satisfy rational basis review to defend Amendment 2 successfully. In support of their argument that Amendment 2 is rational, petitioners urge that many rational justifications "undoubtedly could be established," but they offer the Court only three, and decline to press several they pursued in the state courts.[19] The rationales petitioners advance, however, are not adequate to sustain the amendment and its breadth, even under the more generous standards of rational basis review. *See Heller v. Doe*, 113 S.Ct. 2[illegible]42–43 (1993).

Rational basis review asks what line is drawn by a challenged law and whether that line bears some rational relationship to a legitimate governmental purpose. To make that inquiry, the focus first must be on what the law does. Then a court must inquire why it does it, and ask whether the law's terms are rational given the law's goals. For example, in

[19] Specifically, petitioners contend that Amendment 2, by reducing government oversight of private discrimination, saves limited governmental resources for suspect or other groups more deserving of protection from discrimination. (Pet. Br. 41–43). Petitioners submit, second, that Amendment 2 rationally protects private discrimination so that individual citizens—for associational, religious, familial and personal reasons—do not have to compromise their convictions. (Pet. Br. 43–47). Third, and last, petitioners defend Amendment 2 as a way to provide uniformity in laws statewide, thus giving "large employers and property owners" greater economic and legal predictability in their private affairs. (Pet. Br. 47–48).

Moreno, the challenged legislation denied food stamps to households occupied by unrelated cohabitants. The federal government defended the denial as a way to avoid fraud in the program. The question the Court properly asked was whether the line drawn by the statute (denying food stamps based on the relationship of the household inhabitants) was a rational one, not whether the goal of avoiding fraud was rational. 413 U.S., at 535–38.

Properly focused, the question here is not whether it is rational to have less government regulation, or to have more uniform statewide laws, or to seek to avoid interfering with the religious, moral or associational interests of private citizens. In the abstract, those objectives are of course "rational." The question is whether the line drawn by Amendment 2 (divesting government of authority to address private and public discrimination of any kind against gays, lesbians, and bisexuals) is a rational means to a legitimate end. Petitioners must defend the categorical policy choice to divest all governmental branches of the authority to respond to *any* problem of discrimination based on gay, lesbian, or bisexual status, because *that* is what Amendment 2 does. What must be rational here is the blanket "no protection from any form of discrimination" policy that Colorado voters enacted. Petitioners make no overture whatsoever towards a defense of that policy.

When the inquiry is correctly framed, the inadequacy of petitioners' proffered justifications is transparent. By way of analogy, using petitioners' approach, one could as readily defend a wholesale policy of discrimination against the mentally retarded. Given their particular intellectual and physical capacities, it may be rational to differentiate those individuals for certain purposes (*e.g.*, some kinds of employment). But that fact does not make it rational to differentiate them for all purposes (*e.g.*, special zoning for group homes for the mentally retarded only). Similarly here, the relevant question should be whether it is rational to adopt a categorical policy of discrimination on the basis of sexual orientation, not whether it is rational to distinguish on that basis in specific contexts. Amendment 2 authorizes the former, not the latter. It must be defended on its own terms or not at all.

Even apart from the misdirected focus of petitioners' rationales, the justifications they offer are logically and legally defective. All of those rationales relate to private discrimination, when the measure just as surely (and just as categorically) authorizes public discrimination against gays, lesbians, and bisexuals. A defense of the measure only by reference to select and carefully limited arguments in favor of private discrimination, given that governmental discrimination is equally authorized, provides at best half a rationale, where a whole one is needed. *See Zobel v. Williams*, 457 U.S. 55, 61–63 (1982) (rationale offered by the State to sustain length of residency classification could save only the prospective portion of the law, not the portion based on residency before the law's enactment).

The problem is not simply one of underinclusiveness, or of achieving mathematical nicety in the way the lines are drawn. Rather, at some point, the relationship between the defining personal characteristics and the stated goal becomes so attenuated as to render the focus on those characteristics irrational, arbitrary, or invidious. *See Cleburne*, 473 U.S., at 446 (citing with approval *Zobel*, 457 U.S., at 61–63; *Moreno*, 413 U.S., at 535). Said another way, when a law focuses on unpopular personal traits, there is a point at which the law's loose fit to its purported objectives provides no real confidence that it rests on anything other than prejudice or private bias. Amendment 2 far exceeds that point.

CONCLUSION

For the reasons stated above, the Colorado Supreme Court's judgment should be affirmed.

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APPENDIX A

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